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No. 89-1901

IN THE

Supreme Court of the United States

October Term, 1989

PRINCE EDWARD SCHOOL FOUNDATION,

Petitioner,

v.

HERMITAGE METHODIST HOMES OF VIRGINIA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

1. May a state court give effect to a racially discriminatory trust provision which was the product of a state statute compelling racial discrimination in the creation of educational trusts without violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. May a state court give effect to a trust provision which requires the beneficiary, an educational institution, to refuse admission to black students in violation of a federal anti-discrimination statute, 42 U.S.C. § 1981, in order to receive the benefit of the trust?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Prince Edward School Foundation, which was the appellee below, and the respondent Hermitage Methodist Homes of Virginia, Inc., which was the appellant below. Other parties in the proceedings below were the Miller School of Albemarle County and Seven Hills School, Incorporated, which were appellants in cases consolidated with this case below by the Supreme Court of Virginia and which arose out of the same proceeding in the Circuit Court of the City of Lynchburg. Because the petitioner is of the belief that neither the Miller School of Albemarle County nor Seven Hills School, Incorporated has any interest

in the outcome of this petition, they have not been named as parties herein.

Because this petition for certiorari calls into question the constitutionality of a repealed state statute which is still being given effect by the highest court of the state and because the state is not a party hereto, 28 U.S.C. § 2403(b) may be applicable. Three copies of this petition for certiorari are being served upon the Attorney General of the Commonwealth of Virginia.

RULE 29.1 LIST

The petitioner Prince Edward School Foundation, a non-profit corporation organized under the laws

of the Commonwealth of Virginia, has no parent or subsidiary company.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PRINCE EDWARD SCHOOL FOUNDATION,

Petitioner,

v.

HERMITAGE METHODIST HOMES OF VIRGINIA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioner Prince Edward School Foundation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Virginia, entered in the above-entitled proceeding on January 12, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 239 Va. 46, 387 S.E.2d 740 and is reprinted in the Appendix hereto at A-1.

The letter opinion of the Circuit Court of the City of Lynchburg (Goad, J.) has not been reported. It is reprinted in the Appendix hereto at B-1.

JURISDICTION

The date of the entry of judgment sought to be reviewed in this case is January 12, 1990. On March 2, 1990, the Supreme Court of Virginia denied Prince Edward School Foundation's timely petition for a rehearing.

The jurisdiction of this Court to review the judgment of the Supreme

Court of Virginia is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Va. Code Ann. § 55-26 (Repl. Vol. 1969).

Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as

valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled "an act concerning devises made to schools, academies, and colleges." Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary.

42 U.S.C. § 1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

In 1968 Jack Adams died testate, having executed a will in 1956 and a codicil in 1964. Article IV of the will provided for the residuum of Mr. Adams' estate to be held in trust and the income to be paid to the designated beneficiary. Article IV designated three educational institutions located in Virginia as

successive beneficiaries. The trust contained a racially discriminatory restriction with respect to each of these educational institutions. Each forfeited the right to receive income from the trust upon the admission of any person not a member of the white race. Mr. Adams provided that in the event that all three designated beneficiaries admitted students not of the white race the income from the trust should be paid to one or more Protestant philanthropic or educational institutions in Canada to be selected by the trustee. No racial restriction was placed upon the gift to the Canadian educational institutions. App. F-11 through F-16.

In 1964 Mr. Adams executed a codicil to his will changing the beneficiaries designated to receive the income from the trust. Article IV of the codicil provided that the residuum of the estate be held in trust and that the income therefrom be paid to Prince Edward School Foundation ("Prince Edward") so long as the school operated by it admitted only members of the white race. Three other educational institutions located in Virginia, the Miller School, Seven Hills School, Incorporated, and Hampden-Sydney College, respectively, were designated as successive beneficiaries with the same racially discriminatory provision attaching to the gifts to these beneficiaries.

The last-named beneficiary was the Hermitage Methodist Homes of Virginia, Inc. ("Hermitage Methodist Homes"). No racial restriction was placed upon the gift to the Hermitage Methodist Homes. App. F-27 through F-34.

At the time Mr. Adams executed his will and codicil and at the time of his death, the Commonwealth of Virginia required that an educational trust discriminate on the basis of race in order to be valid. At common law in Virginia all gifts to trustees for educational or charitable purposes were void and would fail unless validated by an act of the legislature. Triplett v. Trotter, 169 Va. 440, 193 S.E. 514 (1937). Section 55-26 of the Virginia Code

validated trusts created for the education of white persons or trusts created for the education of colored persons. In 1937, the Supreme Court of Virginia interpreted this statute to require the trustee of an educational trust to discriminate on the basis of race if the testator failed to identify which race the trust was intended to benefit. Id. The statute also validated trusts for other charitable purposes but did not require discrimination on the basis of race except in the case of trusts created for literary or educational purposes. The racially discriminatory provisions of this statute were not repealed until 1975, some seven years after the death of Mr. Adams. 1975 Va. Acts, ch. 547.

Prince Edward received the income from the trust from its inception in 1968 until 1986, when black students were admitted to the school. In 1987 the trustee filed a bill of complaint to obtain the advice and guidance of the Circuit Court of the City of Lynchburg regarding the efficacy of the racially discriminatory restriction imposed on the educational beneficiaries of the testamentary trust. The five successive beneficiaries and the Attorney General for the Commonwealth of Virginia were named as defendants in the suit.

Prince Edward filed a motion for summary judgment in the circuit court requesting that the court strike the racially discriminatory provisions of

the trust and continue the gift to Prince Edward on the ground that enforcement of the restriction would violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by giving continuing effect to the unconstitutionally discriminatory requirements compelled by former § 55-26 of the Virginia Code. Hermitage Methodist Homes filed a cross-motion for summary judgment on the ground that under the terms of the trust it was entitled to all future income payments. While adopting Prince Edward's argument that the discriminatory trust provisions were unconstitutional and must be stricken, the Miller School and Seven Hills School, Incorporated

opposed the motions for summary judgment on the ground that the court should conduct an evidentiary inquiry to determine the testator's intent in light of the illegality of the discriminatory provisions and apply the doctrine of cy pres. The Attorney General for the Commonwealth of Virginia filed a response asking the court to take no action which would be adverse to the public's interest in charitable trusts. The circuit court granted Prince Edward's motion for summary judgment finding that "[a]ll racially discriminatory conditions of the Trust are unconstitutional and void;" "Prince Edward School Foundation shall continue as the principal and sole beneficiary of the Trust;" and "[t]he

cy pres doctrine is not applicable." App. B-1 through B-6.

Hermitage Methodist Homes, Miller School and Seven Hills School, Incorporated filed appeals with the Supreme Court of Virginia, which consolidated the cases for argument. The Miller School and Seven Hills argued on appeal that the doctrine of cy pres should have been applied. Hermitage Methodist Homes argued on appeal that the discriminatory trust provisions were the product of the testator's own social philosophy, that none of the beneficiaries had a constitutional right to Mr. Adams' charity, that charitable gifts to corporate bodies for educational purposes are valid in Virginia in the absence of a validating statute, and

that § 55-26 of the Virginia Code did not compel Mr. Adams to discriminate in the creation of the educational trust. Prince Edward argued that the circuit court had correctly decided that the discriminatory provisions of the trust violated the equal protection clause of the Constitution and were therefore void, but that the gift to Prince Edward was valid. Prince Edward further argued that the discriminatory provisions of the trust were illegal and void because they required the educational beneficiaries to deny admission to black students in violation of federal law, 42 U.S.C. § 1981, and public policy in order to benefit under the trust.

The Supreme Court of Virginia formulated the issues to be decided by it as follows: "First, are the discriminatory provisions of Article IV valid, or are they unconstitutional and invalid? Second, if such provisions are invalid, is the primary educational bequest of the trust nevertheless valid, or must it fail, requiring future income to be paid to Hermitage? And, third, if the provisions are invalid, is the doctrine of cy pres applicable?" App. A-16 through A-17.

After reiterating Prince Edward's constitutional argument, which was joined by Miller School and Seven Hills School, App. A-17 through A-20, the court stated "we will agree with

Prince Edward, Seven Hills School, and the Miller School on the first issue for purposes of this decision." App. A-21. "Thus, we will assume, without deciding, that the trial court correctly ruled that the racially discriminatory provisions are unconstitutional and void." App. A-21. Having assumed that the ability of Mr. Adams to create this educational trust had its sole source in a state law, § 55-26 of the Virginia Code, which required him to discriminate on the basis of race in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 11, of the Constitution of Virginia, the Supreme Court of Virginia nevertheless gave effect to the discriminatory provisions "based

on principles of real property law." App. A-21. The court held that because the racially discriminatory restriction was couched in terms of a special limitation, that is, "each educational beneficiary's right to receive income extended only 'so long as' the beneficiary complied with the restrictive provision," App. A-21, rather than in terms of a condition subsequent, that is, the educational beneficiary had a right to receive the income, but if it violated the restrictive provision this right would cease, the gifts to the educational beneficiaries were not valid. App. A-21 through A-22. The court grounded its decision on dictum in Meek v. Fox, 118 Va. 774, 88 S.E. 161 (1916), which held that a

restraint against marriage couched in terms of a condition subsequent was void as against public policy, but the gift was valid. According to dictum in the case, had the restraint against marriage been couched in terms of a limitation, the limitation would have been valid and enforceable. While the court below acknowledged that Meek "did not address the issue of what happens when a gift subject to a special limitation offends constitutional considerations," App. A-30, it held that the gifts to the educational beneficiaries failed because of the unlawful limitation. App. A-31 through A-32. Finally, the court rejected the contentions of the Miller School and Seven Hills School

that the doctrine of cy pres was applicable and that evidence should be taken to determine the testator's intent in view of changed circumstances. App. A-33 through A-35.

Prince Edward filed a timely petition for rehearing on the ground that by invalidating the gift to Prince Edward because of the unconstitutional racially discriminatory limitation the court was in effect enforcing the unconstitutional restriction in violation of the Fourteenth Amendment's guarantee of equal protection under the laws. Prince Edward argued in its petition for rehearing that under the principles announced by this Court in Shelley v.

Kraemer, 334 U.S. 1, 22 (1948), "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." Petition for Rehearing at 13-14. Prince Edward urged that its petition be granted in order that the court might have the benefit of briefing and oral argument on the question it found dispositive, that is, whether the technical distinction between a limitation and a condition determines the validity of a gift subject to an unconstitutional racially discriminatory restriction -- an argument which was never advanced by any party to the proceeding. The petition for rehearing was denied on

March 2, 1990 without explanation. App. E-1 through E-2.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Virginia is in conflict with that of the federal three-judge district court which enjoined enforcement of a similar racially discriminatory trust provision in Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967). Cf. Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974); Ward v. Illinois, 431 U.S. 767, 770-71 (1977) (cases in which this Court noted probable jurisdiction of an appeal from the highest court of a state to resolve a conflict with a decision of a federal three-judge district court

with respect to rulings on the constitutionality of the same state statute). In Sweet Briar Institute, the court was asked to enjoin enforcement by the Attorney General of Virginia and other state defendants of a racial restriction in a testamentary trust limiting the students who could be admitted to Sweet Briar College in Virginia to "white girls and young women." 280 F. Supp. at 312. The testator in Sweet Briar, whose will was written in 1899, was compelled under former § 55-26 of the Virginia Code to discriminate on the basis of race in the creation of an educational trust, 280 F. Supp. at 313, as was Mr. Adams in the instant case. This Court reversed the three-judge district

court's initial order of abstention and remanded for consideration on the merits, 387 U.S. 423 (1967). On remand, the three-judge district court held that "[t]he State cannot require compliance with the testamentary restriction because that would constitute State action barred by the Fourteenth Amendment." 280 F. Supp. at 312.

Regardless of whether enforcement of the state-compelled racial restriction is by the attorney general of the state, as threatened in the Sweet Briar case, or by the state supreme court, as in this case, the equal protection clause of the Fourteenth Amendment is violated. As this Court stated in Shelley v. Kraemer, 334 U.S. 1, 17 (1948), "the

action of state courts in enforcing a substantive common-law rule formulated by those courts may result in the denial of rights guaranteed by the Fourteenth Amendment."

After assuming that the circuit court correctly held that the racially discriminatory restrictions in the trust are "unconstitutional and void," App. A-21, the Supreme Court of Virginia nonetheless gave them effect by invalidating the educational gift to Prince Edward and the three successive educational beneficiaries. App. A-31 through A-32. The right to receive the income from the trust vested in Prince Edward for a period of eighteen years. As a result of the legislature's mandate in former § 55-

26 that educational trusts be created in a discriminatory manner, this right to receive the income was subject to divestment upon the admission of black students to the school. But for the void limitation, which the court acknowledges was the product of unconstitutional state action, Prince Edward's right to receive the income from the trust would have continued in perpetuity (unless it ceased operating a school). App. F-27 through F-29. As a result of the court's ruling, Prince Edward is deprived of the benefit of the trust solely because it has admitted black students in violation of an unconstitutional and void provision. This result gives effect to a trust provision which is

the product of unconstitutional state action and therefore deprives Prince Edward and its current and prospective black students of equal protection under the law.

The court grounded its holding on a distinction between a special limitation and a condition. According to the court, the language of the limitation ("so long as," App. A-27 through A-28) "marks the utmost time of continuance of the estate.... [a]nd, a limitation cannot be altered to extend 'beyond that period without violating the terms of the devise'" (citation omitted). App. A-30. In this case, however, the terms of the devise which should be altered have been held to be unconstitutional and void.

The court's decision is not saved from offending constitutional strictures by a claim that it is "based on principles of real property law." App. A-21. In Shelley v. Kraemer, 334 U.S. 1 (1948), this Court found state courts which had enforced racially restrictive covenants to have acted in violation of the Fourteenth Amendment despite the fact that they were merely enforcing a substantive common-law rule based on principles of real property law. The Supreme Court stated that it is "beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." 334 U.S. at 22. Having assumed the

discriminatory provision of the trust to be in violation of the Fourteenth Amendment because discrimination in creating educational trusts was required by § 55-26, the court violated the Fourteenth Amendment's guarantee of equal protection under the law by giving force to the provision.

In Barrows v. Jackson, 346 U.S. 249 (1953), the Court ruled that a racially restrictive covenant could not be enforced at law by a suit for damages against a co-covenantor who violated the covenant. The court stated as follows:

> To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that

> sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant.

Id. at 254.

Similarly, to require Prince Edward to forfeit its entitlement to receive the income from the trust (the corpus of which is currently valued in excess of one million dollars) punishes it for its failure to comply with the racially discriminatory trust provision. The result of that sanction by the Commonwealth of Virginia is to encourage the use of racial

limitations. To that extent, the state acts to put its sanction behind the restriction. As the Court held in Barrows, such a result does not accord with the Fourteenth Amendment. The instant case is, in some respects, even more compelling than Shelley and Barrows because in those cases the restrictive covenants at issue were the product of purely private discrimination. Here, as the circuit court held and the supreme court acknowledged, the racial restriction was the product of unconstitutional legislative state action.

The Supreme Court of Virginia based its decision in this case on the distinction between a condition and a limitation. App. A-21 through

A-33. The condition-limitation distinction is uniformly disparaged by modern treatise-writers, at both the national and state level. The American Law Institute takes the position in the Restatement (Second) of Trusts § 401, comments f and h (1959) that there is no distinction between illegal conditions and illegal limitations with respect to the validity of the gift. When either a limitation or a condition is illegal, it is invalid, but the charitable gift itself is valid. In the section on restraints against marriage, the Restatement (Second) of Property (Donative Transfers), Introductory Note to Chapter Six at 252 (1983) refers to the distinction as "bizarre" and "arcane." The

distinction has also been described as "utterly irrational," L. Simes and A. Smith, The Law of Future Interests § 1514 at 402 (2d ed. 1956), and as a "refinement on language ... which seems wholly out of place in modern law." Harrison on Wills and Administration For Virginia and West Virginia § 363 at 254 (3d ed. 1986). It may be of no moment to this Court that Virginia adheres to this obscure property law distinction in matters of local law, such as the validity of restraints against marriage. In light of the constitutional considerations present in this case, however, a compelling state interest must exist in order for a state court to deprive Prince Edward and its students of valuable rights as a

result of state compelled classification of the beneficiaries of this educational trust according to race. Prince Edward asserts that no such compelling state interest exists in this case. While this Court may be bound by the state's interpretation of its own laws, it clearly is not bound by the Supreme Court of Virginia's assessment that its holding does not violate the United States Constitution. See Griffin v. School Board, 377 U.S. 218, 229-30 (1964).

This case is not controlled by Evans v. Abney, 396 U.S. 435 (1970), relied upon by the respondent below. The key to the holding in Evans v. Abney was that while the Georgia trust statutes permitted racially

discriminatory restrictions they did not require them. 396 U.S. at 444, 445, 446; see also Evans v. Newton, 382 U.S. 296, 306 (1966) (White, J., concurring) ("As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination."). In contrast, former § 55-26 of the Virginia Code required racial discrimination in the creation of an educational trust. Such was the holding of the Supreme Court of Virginia in Triplett v. Trotter, 169 Va. 440, 193 S.E. 514 (1937).

The Court in Evans v. Abney emphasized that "the language of the Senator's will shows that the racial

restrictions were solely the product of the testator's own full-blown social philosophy." 396 U.S. at 445. The Supreme Court of Virginia did not find the restriction in Mr. Adams' trust to be the product of his own private philosophy. The court agreed with Prince Edward that the restriction was the product of § 55-26 of the Virginia Code which compelled discrimination on the basis of race with respect to educational trusts rather than the product of his own social philosophy as argued by Hermitage Methodist Homes. App. A-19 through A-21.

Indeed to the extent that Mr. Adams' intent is even relevant where his actions were compelled by the state, see Peterson v. City of

Greenville, 373 U.S. 244, 248 (1963) (when a state passes a law compelling persons to discriminate on the basis of race and then enforces the discrimination mandated by that law, "such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators"), the fact that he did not attach a racial restriction with respect to the last-named income beneficiary in his original will, that is, the Canadian educational institutions, App. F-16, suggests that he had no personal animus toward integrated educational institutions. From its earliest form passed in 1839 until it was amended in 1954, § 55-26 and its predecessors validated gifts made on a

discriminatory basis for the education of persons within the State of Virginia. 1954 Va. Acts, ch. 145. In Triplett v. Trotter, 169 Va. 440, 446-47, 193 S.E. 514, 516 (1937), the Supreme Court of Virginia construed "within this State" to refer to educational institutions located in Virginia.

The decision of the Supreme Court of Virginia raises an important constitutional question for adjudication by this Court not only because it deprives Prince Edward's current and prospective black students of equal protection under the law, but also because it may well vitiate other trusts, gifts, grants, devises or bequests benefitting public and private educational

institutions in Virginia made during the one hundred and thirty-six year period during which Virginia by statute compelled the making of such gifts on a racially discriminatory basis. The decision stands for the proposition that any such educational gift including a racial restriction by way of limitation is invalid. The effect of this decision is to give continuing life to an unconstitutional state statute which was repealed by the state legislature fifteen years ago.

Apart from constitutional considerations, the decision presents an important question whether a state court may properly penalize an educational institution for complying with federal law. The decision

provides a device, that is, a racially discriminatory provision in the form of a limitation, by which testators and donors in the future may require their educational beneficiaries to discriminate on the basis of race in order to benefit, in violation of 42 U.S.C. § 1981, which forbids private discrimination in the making of contracts, and in violation of a national public policy which seeks to eliminate racial discrimination in private as well as public education. If the beneficiary refuses to discriminate on the basis of race, it would lose the benefit of the gift. This would be true whether a state court construing the limitation held it to be valid or void. As the court stated below:

"Whether the discriminatory provisions are valid or void, the result is the same." App. A-21; A-32 through A-33.

In Runyon v. McCrary, 427 U.S. 160 (1976), which was reaffirmed just last Term in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), this Court held that 42 U.S.C. § 1981 prohibits a private, non-sectarian school from discriminating against applicants for admission on the basis of race. Section 1981 prohibits racial discrimination in the making and enforcing of private contracts.

Furthermore, this Court has held that private schools with racially discriminatory policies are not entitled to tax exempt status because such policies are contrary to public

policy. Bob Jones University v. United States, 461 U.S. 574, 592-96 (1983). The Court stated that "racial discrimination in education violates deeply and widely accepted views of elementary justice" and "violates a most fundamental national public policy." Id. at 592, 593.

Obviously, a gift to an educational institution containing a racially discriminatory restriction encourages the institution to discriminate in violation of federal law and national public policy. This is true whether the restriction is couched in terms of a limitation or a condition. The Supreme Court of Virginia has announced, however, that it will honor such a restriction in the form of a limitation by requiring

forfeiture of the gift. If this decision does not directly conflict with the Court's decisions in Runyon and Bob Jones University, it certainly erodes the principles which they espouse. Cf. Hurd v. Hodge, 334 U.S. 24 (1948) (federal court in District of Columbia may not enforce racially restrictive covenants which violate 42 U.S.C. § 1982 and national public policy). Whether a state court may enforce its property laws in such a way as to encourage violation of a federal anti-discrimination statute and national public policy, and, in the instant case, in such a way as to penalize compliance with § 1981, presents an important question for consideration by this Court.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

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May 31, 1990

APPENDIX A

IN THE SUPREME COURT OF VIRGINIA

Present: Carrico, C.J., Compton, Stephenson, Russell, Whiting and Lacy, JJ., and Harrison, Retired Justice

OPINION BY JUSTICE
A. CHRISTIAN COMPTON
January 12, 1990

HERMITAGE METHODIST HOMES
OF VIRGINIA, INC.

v. Record No. 881353

DOMINION TRUST COMPANY, TRUSTEE,
ETC., ET AL.

THE MILLER SCHOOL OF
ALBEMARLE COUNTY

v. Record No. 881354

DOMINION TRUST COMPANY, TRUSTEE,
ETC., ET AL.

SEVEN HILLS SCHOOL INCORPORATED

v. Record No. 881390

DOMINION TRUST COMPANY, TRUSTEE,
ETC., ET AL.

FROM THE CIRCUIT COURT OF THE
CITY OF LYNCHBURG
Robert C. Goad, Judge

We consolidated three appeals arising from a single suit brought by the trustee of a charitable, testamentary trust. The trustee sought the trial court's aid and guidance in administration of the trust and in construction of certain racially discriminatory trust provisions applicable to private educational institutions. The provisions allegedly are unconstitutional and unenforceable.

In 1956, Jack Adams, a resident of Lynchburg, executed his will establishing the trust in question. In 1964, the testator executed a codicil to the will. In 1968, Adams

died testate. The will and codicil, drafted by a Lynchburg attorney, were duly probated.

Article IV of the codicil provides that the residuum of Adams' estate be held in trust and the income therefrom be distributed pursuant to clause (a). The clause provides, in part:

> "So long as Prince Edward School Foundation, Prince Edward Co., Va., admits to any school, operated or supported by it, only members of the White Race . . . my said Trustee shall pay the net income . . . to the Trustees (or other governing body) of such Foundation, to be expended by them . . . for the benefit of any of said schools."

The clause further provides:

> "In the event that the said Foundation should cease to operate for one year, or should at any time permit to matriculate in any of the schools operated or supported

> by it any person who is not a member of the White Race, no further payment of income shall be made to the said Foundation; but all income accruing after such date shall be paid to the Trustees of the Miller School, situated in Albemarle County, . . . so long as said School admits only members of the White Race; said income shall be expended by such Trustees . . . for the payment of the expenses of maintaining and operating said School . . . ."

The clause further provides for successive gifts over first to Seven Hills School, Inc., located in Lynchburg, and then to Hampden-Sydney College, in the event of the occurrence of the same contingencies. The final beneficiary of the successive gifts over is Hermitage Methodist Homes of Virginia, Inc., without the limitation of the described contingencies.

Code § 55-26 (Repl. Vol. 1974) was effective when the will and codicil were executed, and at the time of the testator's death. It provided, as pertinent:

> "Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, . . ."

In Triplett v. Trotter, 169 Va. 440, 193 S.E. 514 (1937), this Court

construed the statute as validating a charitable gift for the education of members from one of the two races, but not from both. Id. at 445, 193 S.E. at 516.

In 1975, the General Assembly repealed § 55-26. Acts 1975, ch. 547. In the next year, the legislature enacted the substance of former § 55-26 without the discriminatory provisions as present Code § 55-26.1. Acts 1976, ch. 546.

In 1987, appellee Dominion Trust Company filed the present suit naming as parties defendant the income beneficiaries and the Attorney General of Virginia. Asserting that it was the successor trustee of the Adams Trust, the trustee alleged that it had paid over the income to Prince

Edward School Foundation since the creation of the trust. It stated that "a determinable event" as described in Article IV may have occurred with respect to the school administered by the Foundation. (Counsel represented at the bar of this Court that subsequent to creation of the trust each educational beneficiary had enrolled black students in its schools.)

The trustee sought advice and guidance on "whether the determinative event or contingency [was] legal, valid and enforceable." Therefore, the trustee asserted, it was "uncertain as to the proper income beneficiary of said trust" and asked the court to construe and

interpret the will to determine the rights of the parties.

In its answer, Prince Edward, stating that it does not discriminate in the admission of students to the school, asserted that the discriminatory provisions of Article IV of the will "are illegal, invalid and unenforceable," and that the proper interpretation of the disputed provisions requires "the continued payment of the trust income to the Prince Edward School Foundation without interruption or diminution." Prince Edward asserted that the "racially discriminatory provisions of Article IV are unconstitutional under Article I, § 11 of the Constitution of Virginia and the

Fourteenth Amendment of the Constitution of the United States."

In its answer, the Miller School likewise asserted that the trust provisions under Article IV are discriminatory and unconstitutional. It further asserted that since "the precise object of the trust fails because of the trust's illegality," it should be entitled to all the income from the trust under the doctrine of cy pres because the testator's "primary charitable intent" was to benefit the Miller School.

In its answer, Seven Hills School also asserted that the trust provisions are unconstitutional and also asked the court to apply the cy pres doctrine to find that it "should

be entitled to all or such portion of the income from said trust as may be determined proper without enforcing the illegal racially discriminatory provisions thereof."

In its answer, Hampden-Sydney College, asserting that it has accepted students "without regard to race, color, creed or religion," asked the court to construe and interpret the will, and to award it all sums to which it may be entitled under the will and trust.

In its answer, the Hermitage Methodist Homes of Virginia, Inc., asked the court to construe the will and trust, stating that it employs no racially discriminatory conditions upon the admission of persons into its homes for the aging and that it

would "accept all sums which may be due it under the will and trust," if the court found it so entitled.

In her answer, the Attorney General joined in the request for interpretation of the documents. Also, she asked that "no action be taken which is adverse to the public's interest in charitable trusts."

Additionally, Prince Edward filed a motion for summary judgment. It asserted that absent a statute, the common law of Virginia does not recognize the validity of a charitable trust like the one in issue here. It asserted that former Code § 55-26 "was the sole statutory basis for the creation of a trust for educational purposes with a corporate

beneficiary." Further, Prince Edward alleged the discriminatory provisions of Adams' will, as amended by the codicil, were necessary to make a valid bequest under Code § 55-26. Thus, according to Prince Edward, the discrimination compelled by the Commonwealth through the statute violated the rights of Prince Edward and its students to equal protection of the laws under the Fourteenth Amendment.

Further, Prince Edward alleged that neither the trustee, the court, nor the Attorney General can compel or effect a divestiture of it as beneficiary of the trust because such action would be unconstitutional by "giving continuing effect to the unconstitutional discriminatory

requirements" of repealed § 55-26. Thus, Prince Edward asked the court to strike the discriminatory language from the will, give effect to the primary charitable intent of the testator to promote the education of children by the Prince Edward School Foundation, and order the trustee to pay it all trust income.

Hermitage also filed a motion for summary judgment. It asserted that the trust is valid and that the language should be given its plain meaning to carry out the testator's intent. When this is done, according to Hermitage, a "determinable event has occurred with regard to each" other income beneficiary, resulting in the final beneficiary, Hermitage, "being entitled under the terms of

the trust to receive all future trust income payments as they become due."

Upon consideration of the argument of counsel on the motions for summary judgment, the trial court, in a letter opinion, granted Prince Edward's motion and denied Hermitage's motion. The court found, "All racially discriminatory conditions of the Trust are unconstitutional and void." The court further determined that Prince Edward "shall continue as the principal and sole beneficiary of the Trust, as long as the school remains in operation."

The court also ruled that if Prince Edward ceases operation for one year, all income accruing after such date shall be paid to Miller

School. The court pointed out that the trust named three more successive, but not joint, beneficiaries "each of whom may become the principal and sole beneficiary of the Trust in the event that all prior beneficiaries named, in the order set forth, cease to operate." The court said, "This construction gives full recognition to the intent of the testator in naming successive beneficiaries." Finally, the court ruled that the cy pres doctrine was inapplicable.

From the September 1988 final decree incorporating those rulings, we awarded separate appeals to Hermitage, Miller School and Seven Hills School. The trustee, Hampden-Sydney College, and the Attorney

General did not participate in the appeals.

Hermitage assigns error to the trial court's rulings that the conditions of the trust are unconstitutional and void, and that Prince Edward shall continue as the sole beneficiary of the trust as long as the school operates. Seven Hills School and Miller School assign error to the trial court's ruling granting Prince Edward's motion for summary judgment and its decision that cy pres is not applicable.

These assignments of error present the following issues on appeal. First, are the discriminatory provisions of Article IV valid, or are they unconstitutional and invalid?

Second, if such provisions are invalid, is the primary educational bequest of the trust nevertheless valid, or must it fail, requiring future income to be paid to Hermitage? And, third, if the provisions are invalid, is the doctrine of cy pres applicable?

On the first question, Seven Hills School and Miller School adopt the trial court's ruling that the racially discriminatory conditions of the trust established in Adams' will are unconstitutional under both the federal and Virginia constitutions. The constitutional argument is articulated by Prince Edward as follows. The Fourteenth Amendment to the United States Constitution prohibits a state from denying any

person within its jurisdiction the equal protection of the laws. Article I, § 11, of the Constitution of Virginia provides "that the right to be free from any governmental discrimination upon the basis of . . . race [or] color, . . . shall not be abridged. . . ." Thus, the argument goes, all persons in Virginia, including the students and prospective students of the educational institutions named as beneficiaries of the Adams Trust, have a constitutional right to be free from state-compelled racial discrimination.

The argument continues that the Supreme Court of the United States has established a clear distinction between deprivation by the state, so-

called "state action," and purely private conduct against which the Fourteenth Amendment affords no protection. See e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974). Here, the racially discriminatory conditions of the trust are unconstitutional because they are compelled by state law, specifically by repealed Code § 55-26. As interpreted in Triplett v. Trotter, supra, for an educational trust to be valid in Virginia, the statute required the beneficiary school to admit students from one of the two races, but not from both.

Accordingly, the argument goes, "the ability of Mr. Adams to create this educational trust had its sole source in a state law which required

him to discriminate on the basis of race in order to give effect to his intent to further education." The argument points out that while § 55-26 required discrimination with respect to educational trusts, it did not impose such a requirement with respect to general charitable gifts, such as the gift over to Hermitage.

On the other hand, Hermitage contends that the application of the restrictive provisions of the trust would not constitute a deprivation of any constitutionally protected right. It argues that the provisions were not the result of any "state action," or state-compelled conduct, but were motivated by the testator's own social philosophy, regardless of any statute.

Because of the view we take of the second issue, based on principles of real property law, we will agree with Prince Edward, Seven Hills School, and the Miller School on the first issue for purposes of this decision. Whether the discriminatory provisions are valid or void, the result is the same, as we will demonstrate below. Thus, we will assume, without deciding, that the trial court correctly ruled that the racially discriminatory provisions are unconstitutional and void. This brings us to the second issue, that is, whether the educational trust is otherwise valid.

Asserting that the restrictive language provides for an illegal condition subsequent, Prince Edward

relies on Meek v. Fox, 118 Va. 774, 88 S.E. 161 (1916), to sustain the trial court's ruling that the racially discriminatory condition is void, but the gift is valid.

The issue presented in Meek involved the proper construction of a will regarding the testator's devise to his daughter, Julia Anne. In the will, the testator devised one-third of his land to his son in fee simple. To Eliza, his only married daughter, he devised one-third of his land during her life, remainder to her heirs. The testator made the following provision for Julia Anne: "Also to my daughter, Julia Anne, I desire that she shall have her equal share laid off, also according to quality and quantity,

and she shall have it forever, except she should marry, then at her death I desire that it shall revert to her legal heirs."

After the testator's death, Julia Anne married. Later, she conveyed the land devised by the above clause to one Fox and another. After Julia Anne's marriage, her brother conveyed his land to one Meek, and included in his conveyance what he claimed to be his remainder in the land devised to his sister, Julia Anne, by the foregoing clause of the will.

In the ensuing litigation brought to remove a cloud upon the title to the land devised to Julia Anne, the appellant claimed the land under the conveyance to Meek while the appellees claimed under Julia Anne.

The appellees contended that a fee simple estate vested in Julia Anne under the will; that the provision in the will created a condition subsequent in general restraint on marriage; that the condition was void as against public policy; and that the subsequent marriage of Julia Anne did not divest her of the fee simple estate, but the same continued in her and was passed from her by the conveyance to Fox.

This Court agreed with the appellees and held that the devise to Julia Anne, "and she shall have it forever," transferred to her upon the testator's death a fee simple estate in the land. The Court further held that the added provision of the devise, "except she should marry,

then at her death I desire that it revert to her legal heirs," was a condition subsequent and was in restraint of marriage, and void. Therefore, the Court struck the condition, "and the estate thus became absolute and free from condition." Id. at 779, 88 S.E. at 162.

Drawing on the rationale of Meek, Prince Edward contends that because the discriminatory condition is void, its "interest in the income from the Trust remains vested" and "a subsequent beneficiary's interest will vest only in the event that Prince Edward ceases operation of a school." We disagree.

The principle of striking the offending condition subsequent and

thereby creating an absolute estate, as applied in Meek, does not control this case because the provision at issue here is not a condition subsequent. Rather, this provision is a special limitation. Further, the estate in personalty created here is defeasible subject to an executory limitation. See Daniel v. Lipscomb, 110 Va. 563, 566-67, 66 S.E. 850, 851-52 (1910) (estate was a fee subject to executory limitation and not determinable fee because future interest was created in third person following defeasible fee, and not possibility of reverter in grantor or his heirs).

Professor Minor explains that "special limitations are created by such words as 'while,' 'during,' 'as

long as,' 'until,' etc. Thus, a grant to A until Z returns from abroad; to a woman while she remains a widow, or during widowhood . . . , to D and his heirs as long as Y has heirs of his body . . . , all these are special limitations and not conditions subsequent." 1 Minor on Real Property § 525 at 690 (Ribble ed. 1928). "Limitations differ from conditions subsequent in this: A limitation marks the utmost time of continuance of an estate; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate." Id., quoted in Meek, 118 Va. at 778, 88 S.E. at 162.

In the granting clauses of Adams' will, he repeatedly specified that

each educational beneficiary's right to receive income extended only "so long as" the beneficiary complied with the restrictive provision. But, if an educational beneficiary violated the restrictive provision by the matriculation of a black student, that beneficiary's interest would terminate, and the gift would devolve to successive educational beneficiaries who had not violated the provision. Further, Adams makes his intent clear in clause (b) that the creation of the educational beneficiaries' rights to receive income "shall be determinable" upon the happening of the contingency and that "all rights" of those institutions, successively to receive income from the trust "shall

automatically terminate." Clearly this is language of limitation and not condition.

Meek makes clear that if the provision in that case had been a limitation, although equally offensive to the public policy against restraints on marriage, the Court could not have found it void. "Hence, while an estate limited 'to A in fee, but if he attempts to alien his estate then to B in fee,' would give A an absolute estate and in fee, free from condition, because the condition is an unreasonable restraint of alienation and void, yet a limitation 'to A until he attempts to alien, and then to B,' would be a perfectly good limitation, and upon A's attempt his estate would cease

and go over to B." 118 Va. at 779-80, 88 S.E. at 162-63. Although it did not address the issue of what happens when a gift subject to a special limitation offends constitutional considerations, the essential nature of a limitation as described by the Court in Meek points to the decision of the issue in this case.

In the words of Minor, a limitation marks the utmost time of continuance of the estate. And, a limitation cannot be altered to extend "beyond that period without violating the terms of the devise." Id. at 779, 88 S.E. at 162. If a condition subsequent is unlawful, a court can merely excise the offending language and leave the remaining

estate intact. But, where a gift or estate subject to a limitation is unlawful, in order to cure the defect the court must terminate the entire gift or estate.

Therefore, unlike in Meek, the interests of the educational charities fail completely. And, this is not because we give effect to an invalid trust provision. Rather, we strike the entire gift to Prince Edward and the gifts to the other educational beneficiaries because the offending language cannot be stricken from the provision without changing the essential nature and quality of the estate. See Evans v. Abney, 396 U.S. 435, 444-45 (1970).

It necessarily follows from the foregoing that, while the gifts to

all the beneficiaries of Adams' charitable educational trust must fail, the executory interest of Hermitage survives. Adams did not place any unconstitutional limitations upon Hermitage's interest. And, as all prior estates have been declared invalid, Hermitage has the only valid, remaining interest. The trial court erred in holding to the contrary.

Because we find that the provision is a limitation, the same final result would be reached if we found that the trust's provisions were constitutional, as we have said earlier. By the natural operation of this limitation, if it were valid, upon the matriculation of a black student into Prince Edward, the

school's interest terminated. And, because as counsel have represented, the educational institutions have all admitted black students, their respective interests in the trust proceeds can never vest into possession. Hermitage would be the ultimate beneficiary since no limitations are placed on its interest.

Finally, we reject the contentions of Seven Hills School and Miller School that, once the restrictive provisions are declared invalid the cy pres doctrine should be applied and evidence taken to determine the testator's intent in view of the changed circumstances.

The doctrine is codified in Code § 55-31, which provides, as relevant:

> "When any . . . person gives, bequeaths, ... any . . . property in trust to or for any educational, charitable or eleemosynary purpose, the indefiniteness or uncertainty of the beneficiaries named in any instrument creating such a gift, bequest . . . or the indefiniteness of the purpose of the trust itself, shall not defeat any such trust and, ... it shall be administered to conform as near as may be to the purpose for which created or, if impossible of performance for this purpose, for some other educational, charitable, benevolent or eleemosynary purpose. . . ."

Here, there is no indefiniteness or uncertainty regarding the beneficiaries or purpose of the trust. Moreover, there is a valid gift over to Hermitage, as we have said, and this eliminates any need for the court to search for the testator's intent. Under these circumstances, it would be

inappropriate to look beyond the four corners of the testamentary documents.

For these reasons, we will affirm the trial court's ruling that cy pres is inapplicable. We will reverse the ruling that the trust income will be paid to Prince Edward. Instead, we will enter final judgment here ordering the trustee to pay all retained trust income and future trust income to Hermitage.

Thus, the final decree of the trial court will be

Affirmed in part, reversed in part, and final judgment.

APPENDIX B

TWENTY-FOURTH JUDICIAL CIRCUIT OF VIRGINIA

Commonwealth of Virginia
Cities of Lynchburg and Bedford
Counties of Amherst, Bedford, Campbell and Nelson

Re: Dominion Trust Company, Trustee of the Testamentary Trust of Jack Adams, deceased, v. Prince Edward School Foundation, et als, in the Circuit Court of the City of Lynchburg

To: All Counsel of Record

From: Robert C. Goad, Judge

Letter Opinion

On June 15, 1988, the Court heard the oral argument of counsel and considered the excellent briefs filed concerning the Motion for Summary Judgment of the Defendant, Prince Edward School Foundation, and the Cross-Motion for Summary Judgment of

the Defendant, Hermitage Methodist Home. During the oral argument, the Defendant, Miller School, without prior notice, filed a Motion to Stay. The Court took all Motions under advisement, and granted counsel further time to investigate the merits of the Motion to Stay. By letter of July 11, 1988, James P. Cox, III, of counsel for Miller School, filed with the Clerk a Notice of Withdrawal of the Motion to Stay, which motion is considered by the Court to be withdrawn, and the Court will now rule on the two Motions for Summary Judgment.

For the reasons and based upon the authorities set forth in the Brief of Prince Edward School Foundation, and in other applicable

Briefs, the Motion for Summary Judgment of Prince Edward School Foundation is granted, and the Cross-Motion for Summary Judgment of Hermitage Methodist Home is denied.

The Court finds:

1. All racially discriminatory conditions of the Trust are unconstitutional and void.

2. Prince Edward School Foundation shall continue as the principal and sole beneficiary of the Trust, as long as it remains in operation, but in the words of the Trust, "In the event that the said Foundation should cease to operate for one year * * no further payment of income shall be made to the said Foundation; but all income accruing after such date shall be paid to the

Trustees of the Miller School, situated in Albemarle County, Virginia, * *."

3. After Miller School, the Trust names three more successive, but not joint, beneficiaries, Seven Hills School, Hampden-Sydney College and Hermitage Methodist Home, each of whom may become the principal and sole beneficiary of the Trust in the event that all prior beneficiaries named, in the order set forth, cease to operate. This construction gives full recognition to the intent of the testator in naming successive beneficiaries.

4. The cy pres doctrine is not applicable.

Mr. Payne, counsel for Plaintiff, will prepare the decree, to be

presented to the Court for entry, after being endorsed by all counsel of record. The decree may allow payment of Plaintiff's costs and reasonable attorneys' fees out of the Trust funds. This will be a final decree striking the case from the docket as fully ended.

Dated July 26, 1988.

/s/ Robert C. Goad
Judge

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APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF LYNCHBURG

DOMINION TRUST COMPANY,
Trustee of the Testamentary Trust of
JACK ADAMS, deceased,

Plaintiff,

v.

PRINCE EDWARD SCHOOL FOUNDATION, et al.

Defendants.

ORDER

THIS CAUSE, came on to be heard on the motion of Hermitage Methodist Home for reconsideration or, in the alternative, for a more definite letter opinion and the reply of Prince Edward School Foundation, no other party having responded to this motion.

UPON CONSIDERATION WHEREOF, it appearing to the Court that the motion should be denied, it is

ORDERED that the alternative motions of the Hermitage Methodist Home are denied.

Entered this 7th day of September, 1988.

/s/ R. C. Goad
Judge

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

DOMINION TRUST COMPANY, Trustee of the Testamentary Trust of JACK ADAMS, deceased,	)	
Plaintiff,	)	
v.	)	FINAL DECREE
PRINCE EDWARD SCHOOL FOUNDATION,	)	
THE MILLER SCHOOL OF ALBEMARLE COUNTY,	)	
SEVEN HILLS SCHOOL INCORPORATED,	)	
HAMPDEN-SYDNEY COLLEGE,	)	
HERMITAGE METHODIST HOME,	)	
and	)	
MARY SUE TERRY, ATTORNEY GENERAL,	)	
Defendants.	)	

THIS CAUSE, which has been regularly matured, set for hearing and docketed, came on to be heard on June 15, 1988, upon the bill of complaint and exhibits therewith, upon the separate answers of Mary Sue Terry, Attorney General, Prince Edward School Foundation, Seven Hills School Incorporated, Virginia United Methodist Homes, Inc., The Miller School of Albemarle County and Hampden-Sydney College, upon the motion for summary judgment filed on behalf of the Prince Edward School Foundation and the cross-motion for summary judgment filed on behalf of the Virginia United Methodist Home, Inc., upon the briefs and reply briefs submitted by the parties, upon the motion to stay filed on behalf of

The Miller School of Albemarle County and was argued by counsel.

Whereupon, the Court took all motions under advisement. By notice of withdrawal, The Miller School of Albemarle County subsequently withdrew its motion to stay.

UPON CONSIDERATION WHEREOF, it appears to the Court that the motion for summary judgment filed by Prince Edward School Foundation should be granted and that the cross-motion for summary filed by Hermitage Methodist Home should be denied for the reasons set forth in the letter opinion of July 26, 1988; it is therefore

ADJUDGED, ORDERED and DECREED that:

1. All racially discriminatory conditions of the Trust are unconstitutional and void.

2. Prince Edward School Foundation shall continue as the principal and sole beneficiary of the Trust, as long as it remains in operation, but in the words of the Trust, "In the event that the said Foundation should cease to operate for one year * * no further payment of income shall be made to the said Foundation; but all income accruing after such date shall be paid to the Trustees of The Miller School, situated in Albemarle County, Virginia, * *."

3. After The Miller School, the Trust names three more successive, but not joint, beneficiaries, Seven

Hills School, Hampden-Sydney College and Hermitage Methodist Home, each of whom may become the principal and sole beneficiary of the Trust in the event that all prior beneficiaries named, in the order set forth, cease to operate. This construction gives full recognition to the intent of the testator in naming successive beneficiaries.

4. The cy pres doctrine is not applicable.

It is further ADJUDGED, ORDERED and DECREED that the motion for summary judgment on behalf of Prince Edward School Foundation is granted and the Trustee is instructed to pay Prince Edward School Foundation all trust income withheld from it together with any earnings thereon

and otherwise to administer the Trust hereafter as directed herein. The sum of $28,377.37 is found to be reasonable costs and attorneys' fees and the Trustee is hereby directed to pay this sum out from the principal of the Trust funds.

The objections and exceptions of The Miller School of Albemarle County, Seven Hills Schools Incorporated, Hampden-Sydney College, United Virginia Methodist Homes, Inc. and Dominion Trust Company to the ruling of this Court and to this order are duly noted.

There being nothing further to accomplish in this cause, the Clerk is ordered to strike it from the docket.

The Clerk is directed to provide certified copies of this Order forthwith to all counsel.

ENTER this 13 day of September, 1988.

/s/ R. C. Goad
Judge

I ask for this:

/s/ John William Crews
Counsel for Prince Edward School Foundation

Seen and objected to:

/s/ Thomas J. Michie, Jr.
Counsel for The Miller School of Albemarle County

/s/ Joseph C. Knakal, Jr.
Counsel for Seven Hills Schools, Incorporated

/s/ Charles L. Cabell
Counsel for Hampden-Sydney College

/s/ R. Kenneth Wheeler
Counsel for Virginia United Methodist Homes, Inc.

/s/ Alexander I. Saunders
Counsel for Dominion Trust Company

Seen:

/s/ Barbara H. Vann, Assistant Attorney General

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of March, 1990.

Hermitage Methodist Homes of Virginia, Inc., Appellant,

against Record No. 881353
Circuit Court No. CH87014891

Dominion Trust Company, Trustee, etc., et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of appellee Prince Edward School Foundation to set aside the judgment rendered herein on the 12th day of January, 1990 and grant a

rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

DOMINION TRUST COMPANY, Trustee of the Testamentary Trust of JACK ADAMS, deceased, Plaintiff, v. PRINCE EDWARD SCHOOL FOUNDATION, Post Office Drawer 328 Farmville, Virginia THE MILLER SCHOOL, Box S Charlottesville, Va. SEVEN HILLS SCHOOL INCORPORATED, Lynchburg, Virginia HAMPDEN-SYDNEY COLLEGE Hampden-Sydney, Virginia HERMITAGE METHODIST HOME, 1600 Westwood Avenue, Richmond, Virginia and	BILL OF COMPLAINT

MARY SUE TERRY, Attorney)
General for the Common-)
wealth of Virginia,)
Supreme Court Building)
101 North Eighth Street)
Richmond, Virginia 23219)
)
Defendants.)

Plaintiff, Dominion Trust Company, by counsel, would respectfully represent:

1. This is a suit seeking advice and guidance from this Court in the administration of the testamentary trust established under the will and codicil of Jack Adams, deceased.

2. Dominion Trust Company (hereinafter "Dominion"), is a banking institution duly licensed to conduct banking activities in the Commonwealth of Virginia. Dominion is the successor trustee of the trust established pursuant to the will of

Jack Adams, deceased, as shall more fully appear hereinafter, which constitutes the subject matter of this bill of complaint.

3. Jack Adams died testate on March 22, 1968. Copies of his will, dated August 27, 1956, and codicil, dated November 19, 1964, duly probated in the Clerk's Office of the Corporation Court for the City of Lynchburg, Virginia, on March 27, 1968, are attached hereto, marked as Exhibits A and B respectively.

4. First National Exchange Bank of Virginia, successor to First National Exchange Bank of Roanoke, Virginia, the executor and trustee named in said will, qualified as executor and trustee thereof on March 27, 1968.

A copy of the Clerk's Order, dated March 27, 1968, is attached hereto marked as Exhibit C.

5. Article IV of said codicil provided that the residuum of the estate of Jack Adams be held in trust and the income therefrom be distributed pursuant to clause (a) which, in part, provides:

> (a) So long as Prince Edward School Foundation, Prince Edward Co., Va., admits to any school operated or supported by it, only members of the White Race, as hereinafter defined, my said Trustee shall pay the net income quarterly, if possible, but at least annually, to the Trustees (or other governing body) of such Foundation, to be expended by them, in their discretion, for the payment of the expenses of maintaining and operating any school or schools operated or supported by it, the award of scholarships to the students thereof, or such other purpose as will be, in the

> judgment of the said Trustees or other governing body, for the benefit of any said schools. In the event that the said Foundation should cease to operate for one year, or should at any time permit to matriculate in any of the schools operated or supported by it any person who is not a member of the White Race, no further payment of income shall be made to the said Foundation; but all income accruing after such date shall be paid to the Trustees of the Miller School, situated in Albemarle County, Virginia, between Batesville and Crozet, so long as said School admits only members of the White Race; said income shall be expended by such Trustees, in their discretion, for the payment of the expenses of maintaining and operating said School, the award of scholarships to the students thereof, or such other purposes as will be, in the judgment of the Trustees, for the benefit of said School.

Clause "(a)" provides for successive gifts over first to the Seven Hills School, Inc., then to Hampden-Sydney

College in the event of the occurrence of the same above-described contingencies. The final beneficiary of the successive gifts over is the Hermitage Methodist Homes of Virginia, Inc., without the limitation of the above-described contingencies.

6. Clause (b) of said Article IV provides, in part, that:

> It is my will that the creation in the Prince Edward School Foundation, Miller School, Seven Hills School, Incorporated, and Hampden-Sydney College, successively, of the right to receive income as hereinbefore set forth, shall be determinable upon the event set out--that is, the admission of a student not of the White Race and upon the happening of such event, all rights of the said Institutions, successively, to receive income from the trust herein established shall automatically terminate.

7. Since the creation of the trust, Dominion has paid over the income of said trust to the Prince Edward School Foundation.

8. Dominion is informed and believes that a determinable event described in said Article IV has occurred with respect to the school administered by the Prince Edward School Foundation.

9. Dominion is without knowledge and cannot determine whether the determinable events described in said Article IV with respect to the Miller School, The Seven Hills School or Hampden-Sydney College have occurred.

10. Dominion is uncertain as to the proper interpretation of said provisions and, whether the determinative event or contingency is

legal, valid and enforceable. Therefore, Dominion is uncertain as to the proper income beneficiary of said trust and desires the advice and guidance of this Court as to the duties bestowed upon it by said provisions.

WHEREFORE, plaintiff, Dominion Trust Company, by counsel, prays that the Court will take jurisdiction of this proceeding; that the Court construe and interpret the will of Jack Adams, deceased, so as to determine the rights of the parties named thereunder; that an order be entered instructing and advising plaintiff as to the proper courses of action it may or must take; that the court costs of your plaintiff and reasonable fees for your plaintiff's

attorneys be allowed to it out of the amount at issue; and that your plaintiff may have such other and further relief as the nature of the case may require and to equity may seem meet.

DOMINION TRUST COMPANY

By /s/ Alex I. Saunders
Of Counsel

Alexander I. Saunders
Phillip D. Payne, IV
WOODS, ROGERS & HAZELGROVE
105 Franklin Road, S.W.
Post Office Box 720
Roanoke, Virginia 24004-0720

Counsel for Plaintiff

Exhibit A

I, JACK ADAMS, of Lynchburg, Virginia, do make, publish and declare this to be my last will and testament, hereby revoking all other wills and codicils by me at any time heretofore made.

ARTICLE I. First of all, I wish to express my thanks to my Maker for having permitted me to live to a ripe old age without having had to go to a hospital for treatment; for Christian parents who tried to inculcate in me the right principles; for permitting me to attain to an old age with so-called material security; and, most of all, for the knowledge that a clear conscience and sense of spiritual

security far transcend in value so-called material security.

ARTICLE II. I direct that all my just debts and funeral expenses be paid as soon after my death as may be convenient.

ARTICLE III. I leave all of my books to the Miller School, situated in Albemarle County, Virginia, between Batesville and Crozet. All the rest of my tangible personal property, I give and bequeath to my sister, Sue Adams.

ARTICLE IV. All the rest, residue and remainder of my property, whether real or personal, of whatsoever nature

and wherever situated, to which I may be legally or equitably entitled, I give, devise and bequeath to the First National Exchange Bank of Roanoke, Roanoke, Virginia, in trust, to be held and managed and the income distributed as follows:

(a) So long as the said Miller School admits only members of the White Race, as hereinafter defined, the Trustee shall pay the net income quarterly, if possible, but at least annually, to the trustees of such School, to be expended by them, in their discretion, for the payment of the expenses of maintaining and

operating said School, the award of scholarships to the students thereof, or such other purposes as will be, in the judgment of the trustees, for the benefit of said School. In the event that the said Miller School should at any time permit to matriculate therein any person who is not a member of the White Race, no further payment of income shall be made to its trustees; but all income accruing after such date shall be paid to the trustees of Roanoke College, of Roanoke, Virginia, so long as said College admits only members of the White Race, as

hereinafter defined; said income to be expended by them, in their discretion, for the payment of the expenses of maintaining and operating said Roanoke College, the award of scholarships to the students thereof, or such other purposes as will be, in the judgment of the trustees, for the benefit of said College. In the event that the said Roanoke College should at any time permit to matriculate therein any person who is not a member of the White Race. no further payment of income shall be made to its trustees, but all income

accruing after such date shall be paid to the trustees of Washington & Lee University, at Lexington, Virginia, so long as the said University admits only members of the White Race, as hereinafter defined; said income to be expended by them, in their discretion, for the payment of the expenses of maintaining and operating said University, the award of scholarships to the students thereof, or such other purposes as will be, in the judgment of the trustees, for the benefit of said University. In the event that the said University

should at any time permit to matriculate therein any person who is not a member of the White Race, no further payment of income shall be made to its trustees, but all income accruing after such date shall be paid to any one or more Protestant philanthropic or educational institutions in Canada to be selected by the said First National Exchange Bank of Roanoke, Virginia.

(b) It is my will that the creation in the Miller School, Roanoke College, and Washington & Lee University, successively, of the right to receive income as hereinabove

set forth, shall be determinable upon the event set out; and upon the happening of such event hereinabove set forth, all rights of the said institutions, successively, to receive income shall automatically terminate. Any further payment of income by my Trustee to any such institutions after it has admitted a student not of the White Race, as herein defined, shall be unauthorized and a violation of its duties as Trustee.

(c) As used herein, "members of the White Race" shall have the definition that such term

now has under the laws of the Commonwealth of Virginia, except that the term shall also include South Koreans, Japanese, American Indians, Nationalist Chinese, and Filipinos. By amplifying the meaning of "members of the White Race", I do not mean to direct the said educational institution to admit as students the additional nationals above specifically named; but their permitting such nationals to enroll as students shall not cause their interest to terminate.

ARTICLE V. As set out in this Article V, "my estate" means all

property, of whatsoever nature, whether real, personal or mixed, held by my Executor during administration, or by my Trustee during the continuation of the trusts herein created.

My Executor, in and about the administration of my estate, and my Trustee, in and about the administration and managing of my estate, shall have, in addition to those now or hereafter granted to or imposed upon them by law, all the authorities, duties and discretions hereinafter set forth, to-wit:

(1) To sell, exchange, lease, convey, and otherwise dispose of any part of, or interest in, my

estate and in making any such disposition to do so either publicly or privately, by such ways and means, at such time or times, and for such prices and considerations, and upon such other terms as to it may seem best;

(2) To vote any stock in such manner as to it may seem proper and, in its discretion, to vote said stock by proxy and to execute and deliver any proxy or proxies therefor, irrespective of whether such proxies contain an express direction as to how they shall be voted, which authority shall include, but shall not be limited to, the authority to vote for or against the

reorganization, consolidation, merger or readjustment of the financial or capital structure of any corporation or other entity, the stock or other securities of which may at any time be held in my estate;

(3) To borrow money for any purpose which may seem judicious, and to pledge, mortgage, or otherwise give any part or all of my estate as security therefor;

(4) To determine what shall be charged against or credited to income and what shall be charged against or credited to principal;

(5) To compromise, settle and adjust any claims differences or controversies of any kind that

may at any time or from time to time arise;

(6) To retain, without liability for loss or depreciation, original properties, real or personal received, for such time as to my Executor or Trustee shall seem best, and to make such investments and reinvestments of my estate in such properties, real or personal, as may seem best and without any restriction to so-called legal investments under any laws now or hereafter applicable to the investment of funds by fiduciaries;

(7) To hold or register any stock or other security at any time constituting a part of my estate in its name or in the name

of a nominee, and it shall not be necessary for my Executor or Trustee to mention or refer, upon any security or upon a registration or transfer book, to the trust upon which the security is held;

(8) To exercise any option governing the payment of the proceeds of any insurance policy payable to my estate which may, under the provisions of such policy, be exercised by an executor or trustee; and,

(9) In general, to exercise, with respect to my estate, any and all powers and discretions that I, myself, might exercise if acting personally.

The exercise, in good faith, of any right or authority given in this Article V to my Executor and Trustee, as well as any calculation or evaluation so made by them, shall be binding upon all persons thereby affected.

ARTICLE VI. My Executor shall continue to treat as income such income as is received during the administration of my estate irrespective of the time of receipt and irrespective of whether it shall have accrued upon securities sold during administration.

ARTICLE VII. I nominate and appoint the said First National Exchange

Bank of Roanoke, Virginia, Executor of this my last will and testament and Trustee of the trusts herein created, and request the Court in which or the Clerk before whom it shall qualify to require no surety of it either as Executor or as Trustee.

All the powers, discretions, and authority herein vested in my Executor and Trustee shall be exercised by its successor or successors.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this my will, written on this and 8 other pages, pages 1 to 8, both inclusive, being

identified by my signature on the margin thereon, on this 27th day of August, 1956, in the City of Lynchburg, Virginia.

/s/ Jack Adams (SEAL)

The foregoing will of JACK ADAMS was this day signed, sealed, published and declared by said testator as and for his last will and testament, in our presence, together at the same time, and we, in his presence and in the presence of each other and at his request, hereunto subscribe our names as attesting witnesses thereto.

/s/ Mildred I. Stone

/s/ Edmund Schaefer, III

/s/ Edward S. Graves

Exhibit B

I, JACK ADAMS, of Lynchburg, Virginia, do make, publish and declare this codicil to my last will and testament dated August 27, 1956.

A. I hereby revoke Article IV of my said will, and in lieu thereof provide as follows:

ARTICLE IV. All the rest, residue and remainder of my property, whether real or personal, of whatsoever nature and wherever situated, to which I may be legally or equitably entitled, I give, devise and bequeath to the First National Exchange Bank of Virginia, Roanoke, Virginia, in trust, to be held and managed and the

income distributed as follows:

(a) So long as Prince Edward School Foundation, Prince Edward Co., Va., admits to any school, operated or supported by it, only members of the White Race, as hereinafter defined, my said Trustee shall pay the net income quarterly, if possible, but at least annually, to the Trustees (or other governing body) of such Foundation, to be expended by them, in their discretion, for the payment of the expenses of maintaining and operating any school or schools operated or supported

by it, the award of scholarships to the students thereof, or such other purposes as will be, in the judgment of the said Trustees or other governing body, for the benefit of any said schools. In the event that the said Foundation should cease to operate for one year, or should at any time permit to matriculate in any of the schools operated or supported by it any person who is not a member of the White Race, no further payment of income shall be made to the said Foundation; but all income accruing after such date shall be paid to

the Trustees of the Miller School, situated in Albemarle County, Virginia, between Batesville and Crozet, so long as said School admits only members of the White Race; said income shall be expended by such Trustees, in their discretion, for the payment of the expenses of maintaining and operating said School, the award of scholarships to the students thereof, or such other purposes as will be, in the judgment of the Trustees, for the benefit of said School. In the event that the said Miller School should at any time permit to matriculate

therein any person who is not a member of the White Race, no further payment of income shall be made to its Trustees; but all income accruing after such date shall be paid to the Trustees or other governing body of Seven Hills School, Incorporated, of Lynchburg, Virginia, so long as said School admits only members of the White Race; said income to be expended by such Trustees, in their discretion, for the payment of expenses of maintaining and operating said School, the award of scholarships to the students thereof, or such

other purposes as will be, in the judgment of the Trustees, for the benefit of said School. In the event that the said School should at any time permit to matriculate therein any person who is not a member of the White Race, no further payment of income shall be made to its Trustees or other governing body, but all income accruing after such date shall be paid to the Trustees of Hampden-Sydney College, Hampden-Sydney, Virginia, so long as said College admits only members of the White Race; said income to be expended by such Trustees, in their

discretion, for the payment of expenses of maintaining and operating said College, the award of scholarships to the students thereof, or such other purposes as will be, in the judgment of the Trustees, for the benefit of said College. In the event that the said College should at any time permit to matriculate therein any person who is not a member of the White Race, no further payment of income shall be made to its Trustees; but all income accruing after such date shall be paid to the Hermitage Methodist Homes of Virginia, Incorporated, 1600

Westwood Avenue, Richmond, Virginia, for the benefit of the Homes maintained by them for aged persons, with preference being given to the Home at present maintained in Richmond, Virginia.

(b) It is my will that the creation in the Prince Edward School Foundation, Miller School, Seven Hills School, Incorporated, and Hampden-Sydney College, successively, of the right to receive income as hereinabove set forth, shall be determinable upon the event set out--that is, the admission of a student not of the White Race; and upon the happening

of such event, all rights of the said Institutions, successively, to receive income from the trust herein established shall automatically terminate. Any further payment of income by my Trustee to any of such Institutions after it has admitted a student not of the White Race shall be unauthorized and a violation of its duties as Trustee.

(c) As used herein, "members of the White Race" shall have the definition that such term now has under the laws of the Commonwealth of Virginia, except that the term shall also include South Koreans,

Japanese, American Indians, Nationalist Chinese, and Filipinos. By amplifying the meaning of "members of the White Race", I do not mean to direct the said educational institutions to admit as students the additional nationals above specifically named; but their permitting such nationals to enroll as students shall not cause their interest to terminate.

B. Cognizance is taken of the fact that the Bank nominated and appointed as Executor and Trustee in Article VII of my said will has been changed to First National Exchange Bank of Virginia. I wish said

Bank to serve as my Executor and Trustee.

C. All buying and selling of securities for the trust must be transacted through Thomson & McKinnon (2 Broadway, New York 4, New York) if they can, in the unrestricted judgment of my Trustee, give proper service in this respect.

D. In all other respects, I do hereby ratify and reaffirm, republish and redeclare my said will.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this codicil to my will this 19th day of November, 1964.

/s/ Jack Adams

The foregoing codicil of JACK ADAMS was signed, sealed, published and declared by the said testator as and for a codicil to his last will and testament, in the presence of us three, all present at the same time, and we, in his presence and in the presence of each other and at his request hereunto subscribe our names as attesting witnesses thereto.

/s/ Linda S. Clements

/s/ Ann P. Shelton

/s/ Edward S. Graves

(2)

No. 89-1901

Supreme Court, U.S.
FILED
JUN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1989

PRINCE EDWARD SCHOOL FOUNDATION,

Petitioner,

v.

HERMITAGE METHODIST HOMES OF VIRGINIA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

No. 89-1901

PRINCE EDWARD SCHOOL FOUNDATION,
Petitioner,

v.

HERMITAGE METHODIST HOMES
OF VIRGINIA, INC.,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT
OF CERTIORARI

I.
PRELIMINARY STATEMENT

In a unanimous decision applying state property law principles the Supreme Court of Virginia has held that the income of a charitable trust devolves to the ultimate beneficiary, The Hermitage Home, regardless of whether the special limitations imposed on the initial gifts to educational institutions were deemed unconstitutional. (A-21).[1] If the

[1] Petitioner, Prince Edward School Foundation, will be referred to throughout as "Prince Edward". Respondent, Hermitage

limitations are assumed to be unconstitutional, they cannot be given legal effect. However, under Virginia future interests principles, the Court cannot merely strike the offensive language without changing the essential nature and quality of the putative gifts and, accordingly, must strike the gifts in their entirety. (A-31).

Methodist Homes of Virginia, Inc., will be referred to throughout as "The Hermitage Home".

The Hermitage Home is a Virginia non-profit corporation and has no parent or subsidiary company.

Hermitage Methodist Homes of Virginia, Inc. v. Dominion Trust Company, 239 Va. 46, 387 S.E.2d 740 (1990), of which Prince Edward seeks review, is contained in an Appendix to the Petition at A-1 through A-35; the Codicil to Jack Adams' last will and testament is contained in that Appendix at F-27 through F-38 and reference is made herein to those portions of the Appendix, indicated by the letter "A" or "F", as appropriate, and followed by the appropriate page numbers.

If, however, the limitations are deemed constitutional, then, inasmuch as each successive ostensible educational beneficiary has violated those limitations, the gift to each such beneficiary terminates by natural operation. (A-32 & -33). In either event, by effect of Virginia property law, the trust income flows to the ultimate beneficiary, The Hermitage Home. (A-32).

II.
QUESTIONS PRESENTED

A. Should the Court undertake to review the decision of the Supreme Court of Virginia that a gift to an educational institution fails regardless of whether the restrictive limitations imposed on that gift are unconstitutional since, under Virginia property law principles, if the limitations are unconstitutional the entire gift is void, if the limitations

are constitutional the gift terminates by natural operation and, in either event, the gift devolves to the ultimate beneficiary?

B. Should the clear intent of a privately administered, charitable, testamentary trust, a product of the testator's own social philosophy and personal desires, be thwarted merely because the testator imposed a racial qualification regarding some, but not all, of the putative beneficiaries, all of whom are likewise private?

III.
STATEMENT OF THE CASE

The Hermitage Home accepts the Statement of the Case submitted in the Petition for Writ of Certiorari (the "Petition") with the exception of the following:

A. Prince Edward states that, "[A]t

common law in Virginia all gifts to trustees for educational or charitable purposes were void and would fail unless validated by an act of the legislature." (Petition at 9).

Because it was not necessary for the Virginia Court to reach the constitutional issue, it also never decided whether the charitable trust was valid even without a validating statute, an argument advanced by The Hermitage Home below.

B. Prince Edward states that the Virginia Court "gave effect to the discriminatory provisions..." (Petition at 17) and that, because of the nature of the gift, upon its violation of the restrictive provisions, its right to receive income would cease and, accordingly, the gift to the educational

beneficiary was not valid. (Petition at 18).

The Virginia Court did not hold that Prince Edward's admission of black students made the gift invalid. On the contrary, the Virginia Court agreed arguendo that the discriminatory provisions were unconstitutional and void (A-21) and then, recognizing that it could not merely excise the offending language without changing the nature of the gift, fairly applied its normal principles of construction to determine the ultimate disposition of the trust. (A-31).

IV.
ARGUMENT

A. There is no Federal Question for the Court to Review

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state

courts that rest on adequate and independent state grounds". Herb v. Pitcairn, 324 U.S. 117, 125 (1945). State courts are the ultimate expositors of state law. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). The Court will not consider the correctness of a decision on non-federal grounds unless it is an obvious subterfuge to evade consideration of a federal issue. Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945).

The Court has recently reexamined its treatment of this jurisdictional issue. In Michigan v. Long, 463 U.S. 1032 (1983), Justice O'Connor wrote:

> If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.
> ...We believe that such an approach will provide state judges with a clearer opportunity to develop state

> jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law.

Id., 463 U.S. at 1041.

The Virginia Court states clearly and expressly that its unanimous decision is based on principles of real property law (A-21) and would be the same regardless of the resolution of any perceived federal constitutional questions. (A-32). It reached its conclusions "without deciding" whether the trust provisions were unconstitutional and void. Instead, the court assumed, arguendo, that the limitations were violative of the constitution and then disposed of the case on state future interests principles. (A-21).

> [W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support

the judgment.

Id., 463 U.S. at 1038, n.4 (quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)). The Virginia Court's decision indicates clearly and expressly that it is based on adequate and independent state real property law grounds (A-21) and, accordingly, this Court should not undertake to review it. Michigan v. Long, 463 U.S. at 1041.

B. The Trust Provisions are not Violative of the Constitution

The Fourteenth Amendment provides, in pertinent part, that "[n]o state shall deny to any person...the equal protection of the laws." U.S. Const. Amend XIV, Section 1. Since this Court's decision in the Civil Rights Cases, 109 U.S. 3 (1883), "the principle has become firmly embedded in our Constitutional law that the action inhibited by the first section of the

Fourteenth Amendment is only such action as may fairly be said to be that of the States.... That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Blum v. Yaretsky, 457 U.S. 991, 1002-03 (1982) (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948). See also Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Court held that, in order for his conduct to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, a party charged with depriving another of a federal right must be a person who may fairly be said to be a "state actor". Id., 457 at 937. "Without a limit such as this, private parties could face

constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." Id.

Petitioner maintains that the racially discriminatory provisions of the Adams Trust were the product of "unconstitutional state action" in that their inclusion was compelled by Virginia statute. (Petition at 25-26). The "state compulsion test" was analyzed in Adickes v. S. H. Kress & Co., 398 U.S. at 169-70. First, plaintiff "must show a deprivation of a right guaranteed to [plaintiff] by the Equal Protection Clause of the Fourteenth Amendment". Id. Second, plaintiff must show that the decision "to discriminate on the basis of race [was made] under the compulsion of state law." Id.

Regarding the first issue, the provisions of Adams' charitable bequest do not constitute a deprivation of any rights guaranteed to Prince Edward by the Fourteenth Amendment. "Surely it cannot be said that any particular individual had a judicially recognizable 'right' to the testator's charity, or an enforceable claim arising from the testator's 'failure' to make a charitable gift to him." Lockwood v. Killian, 375 A.2d 998, 1003 (Conn. 1977)(testator's restriction of trust beneficiaries to members of own religious faith upheld).

> The interest in preserving an area of untrammeled choice for private philanthropy is very great.... Indeed, I find it something of a misnomer to apply the pejorative term "racial discrimination" to a failure to make a charitable gift.

Jackson v. Statter Foundation, 496 F.2d 623, 639-40 (2d Cir. 1974) (Friendly, J.,

dissenting).

Second, Adams' testamentary decisions were not made under "compulsion of state law". Adickes v. S. H. Kress & Co., 398 U.S. at 170. There, the Court held that a violation of the Equal Protection Clause of the Fourteenth Amendment would be made out if plaintiff showed (1) the existence of a state-enforced custom of segregating the races in public eating places and (2) the refusal to serve plaintiff was motivated by that state-enforced custom. Id., 398 U.S. at 173-74.

Here, it is claimed that the Adams Trust would be invalid but for Section 55-26 of the Code of Virginia (Repl. Vol. 1974)[2] and that this statute, in turn,

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[2] This statute was repealed in 1975. 1975 Va. Acts ch. 547. In the next year, the substance of the statute was re-enacted without any discriminatory provisions as current Section 55-26.1 of the Code of Virginia. 1976 Va. Acts ch.

compelled Adams to discriminate on the basis of race. The argument is that the language of the statute validated a gift for the education of either white students or black students but not both and that it, ipso facto, gave impetus to a violation of the Fourteenth Amendment. (Petition at 25-27).

This argument fails, however, for three reasons: First, the statute, by its very language, did not mandate any action on the part of Adams. See Va. Code Section 55-26 (1974 Repl. Vol.). The state did not require Adams to make a charitable gift "but has merely announced the circumstances under which its courts will [consider such a trust valid]." See

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546. Thus, any negligible national concern in the operation of state future interests property laws is further attenuated by a real issue of mootness.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 166 (1978). Adams was free to dispose of his money in almost any fashion he desired, before or after death, by trust or otherwise. He was also free not to give his money away. His creation of the Adams Trust was purely a voluntary, charitable act without compulsion from any body or any thing.

Second, once Adams decided to make a gift to charity, he was not restricted by any Virginia law in the selection of a scheme or vehicle through which to effectuate the gift. Indeed, Virginia has always recognized the validity of direct gifts, without a trust medium, to charitable corporations for purposes within their charters without resort to a validating statute. Fitzgerald v. Doggett's Ex'r., 155 Va. 112, 155 S.E. 129

(1930). Further, he was free to select the legal estate granted to each charitable beneficiary (defeasible or determinable fee).

Third, even after he elected to make a charitable gift and decided to do so by means of a testamentary trust, he nevertheless was not compelled to discriminate by the existence of such statute because his decisions were self-motivated. Indeed, there is no evidence he even knew of the existence of the statute. See Adickes v. S. H. Kress & Co., 398 U.S. at 170.

Cases involving state enforcement of criminal trespass statutes through the arrest and prosecution of citizens on the basis of race are inapposite. See e.g., Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963);

Peterson v. City of Greenville, 373 U.S. 244 (1963). The case of Sweet Briar Institute v. Button, 387 U.S. 423, on remand, 280 F. Supp. 312 (W.D. Va. 1967), is similarly inapplicable. There the District Court refused to allow a local Commonwealth's Attorney and the Attorney General of Virginia to force the Institute to continue to restrict admission to "white girls and young women." Id., 280 F. Supp. at 312-13. Here, however, the Court is neither being asked to uphold criminal convictions nor to force Prince Edward to continue to deny admission to students on the basis of race but, rather, to "effectuate as nearly as possible the explicit terms of [Adams'] will." See Evans v. Abney, 396 U.S. at 444. The police power of the state is in no way being activated.

The Court in Adickes considered Peterson and its progeny in reaching its decision. Adickes, 398 U.S. at 170. Nevertheless, it held that in order to make out a violation of the Fourteenth Amendment petitioner must show that the private actor was motivated by the state-enforced custom of racial segregation in public eating places. Id., 398 U.S. at 174. That burden lies with the party claiming a constitutional violation. The Court said "[w]hatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of Section 1983,...we think it essential that he act with knowledge of and pursuant to that statute". Id., 398 U.S. at 162, n.23. (emphasis added).[3]

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[3] While both Lugar and Adickes addressed claims under 42 U.S.C. Section 1983 rather than directly under the Fourteenth Amendment, the Court has

Thus, even assuming the Virginia statute compelled unconstitutional racial discrimination, unless Adams executed his will knowing of that statute and was motivated by it no state action was involved. Adickes v. S. H. Kress & Co., 398 U.S. at 170. Because the limitations on the gifts reflected Adams' own racial attitudes, judicial noninterference with the natural operation of these limitations would not violate the Fourteenth Amendment. Adickes v. S. H. Kress & Co.,

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explicitly stated that the requirements were identical. "In cases under [Section] 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." Lugar v. Edmondson Oil Co., 457 U.S. at 928 (quoting United States v. Price, 383 U.S. 787, 794 n.7 (1966)). Indeed, the "under-color-of-state-law" requirement may be more stringent than the "state-action" requirement of the Fourteenth Amendment. See Lugar v. Edmondson Oil Co., 457 U.S. at 935, n.18.

398 U.S. at 174.

The decisions in Evans v. Newton, 382 U.S. 296 (1966), and Evans v. Abney, 396 U.S. 435 (1970), fortify this conclusion. In Evans v. Newton, the Court held that because a park devised to a municipality in trust was a public facility it could not continue to be operated on a racially discriminatory basis. 382 U.S. at 302. In view of that decision, the Supreme Court of Georgia, on remand, ruled that the testator's intent to provide a segregated park had become impossible to fulfill and the trust therefore failed. See Evans v. Abney, 396 U.S. at 436.

In their appeal of the Georgia Court's decision, petitioners asserted that, since Georgia's statutes explicitly authorized the inclusion of racial restrictions in a devise of property for

the establishment and preservation of parks, the racial restrictions in the testator's will constituted state action. Id., 396 U.S. at 440. This Court rejected this assertion, however, stating that there was no "indication that [the testator] in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes.... On the contrary, the language of [the testator's] will shows that the racial restrictions were solely the product of the testator's own full-blown social philosophy." Id., 396 U.S. at 445. This Court refused to frustrate the testator's intentions on so thin a reed of unconstitutional discrimination even to the extent of allowing a public park to be closed. Id.

Similarly, the Commonwealth of Virginia is not at all the motivating force in the purely private decision of Adams to include the limitations in his gift. Adams established the trust to benefit private institutions, subject to certain racial limitations. The compelling inference is that these limitations were the product of his own social philosophy. Certainly Prince Edward has not shown otherwise. Moreover, the language in the codicil goes well beyond that which allegedly is mandated by Section 55-26. It reflects an attitude greatly exceeding mere pro forma conformity with a questionable statutory dictate. If Adams merely was attempting to ensure that his gift was valid in accordance with the statute, he need only have made the gift "for the education of

white persons." Indeed, the will and codicil state unequivocally:

> It is my will that the creation...of the right to receive income as hereinabove set forth, shall be determinable upon...the admission of a student not of the White Race; and upon the happening of such an event, all rights of the said Institutions, successively, to receive income from the trust herein established shall automatically terminate. Any further payment of income by my Trustee to any of such Institutions after it has admitted a student not of the White Race shall be unauthorized and a violation of its duties as Trustee. (F-34 & -35).

It is inferable, if not inescapable, from the language used that Adams needed no legislative stimulus. Accordingly, his decision to discriminate, being self-motivated, was not a violation of the Fourteenth Amendment. Adickes v. S. H. Kress & Co., 398 U.S. at 170; Evans v. Abney, 396 U.S. at 445.

Petitioner asserts that the Virginia Court has given force to the discriminatory provisions (Petition at 29) and that, notwithstanding that its decision is "based on principles of real property law" (A-21); it cannot withstand this Court's scrutiny in light of Shelley v. Kraemer, 334 U.S. 1 (1948). However, this Court's distinction of Shelley from the facts in Evans v. Abney, 396 U.S. 435 (1970), is equally appropriate in the instant case. Here, the effect of the Virginia Court's decision is to eliminate all discrimination in the educational trust by eliminating the educational trust, a loss shared by white and black students equally in the same manner as the closing of the public park in Georgia. See Evans v. Abney, 396 U.S. at 445. Indeed, the Virginia Court agreed arguendo that the objectionable

provisions were unconstitutional and void (A-21) and then fairly applied its normal principles of construction. The court itself stated:

> [T]he interests of the educational charities fail completely. And, this is not because we give effect to an invalid trust provision. Rather, we strike the entire gift to Prince Edward and the gifts to the other educational beneficiaries because the offending language cannot be stricken from the provision without changing the essential nature and quality of the estate.

(A-31 (citing Evans v. Abney, 396 U.S. at 444-45)). "[T]he Constitution imposes no requirement upon the [Virginia] courts to approach [Adams'] will any differently than they would approach any will creating any charitable trust of any kind." Id., 396 U.S. at 446.

C. The Trust Provisions are not Violative of any Federal Statute or "National Public Policy"

Contrary to petitioner's implication, 42 U.S.C. Section 1981 has no application to the Adams Trust. As the Court has recently held:

> By its plain terms, the relevant provision...protects two rights: "the same right...to make...contracts" and "the same right...to enforce contracts." ... The first of these protections extends only to the formation of a contract, but not to the problems that may arise later.... The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2372-73 (1989). Jack Adams made no contracts with and denied the enforcement of no contracts to any Virginia private school or any aspiring Virginia private school student.

Further, if, as Prince Edward now ironically urges, there is a national

public policy mandating that private institutions must be racially integrated to be socially or constitutionally acceptable, it suffers no harm as a result of allowing the Virginia Court's decision to stand. The effect of that decision is not to enforce a will provision founding a segregated school or compelling racial discrimination at existing facilities. Adams had the power to force nothing. Each of the educational institutions named in the will is racially integrated and undoubtedly will remain so. Certainly Adams anticipated that possibility when he executed his will and codicil. This Court, in not interfering with that decision, will not be affecting the altruistic change of heart had eventually and without deliberate speed by Prince

Edward for reasons satisfactory to itself[4] but will be enhancing care for the elderly of all races while at the same time remaining faithful to its standards of review, the property laws of Virginia and Adams' charitable intent.

V.
CONCLUSION

The Supreme Court of Virginia's decision was based on independent and adequate state grounds and, accordingly, this Court should not undertake to review that decision.

To the extent this Court deems it appropriate to consider the arguments raised in the Petition, The Hermitage Home respectfully asserts that there is no unconstitutional deprivation of protected

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[4] Including, undoubtedly, the hope, at least, that it could do so and yet somehow continue to receive Adams' largesse.

interests. Jack Adams voluntarily established a private, charitable trust to benefit certain private institutions. His terms were clear and unequivocal.

The racially restrictive provisions of the trust were not compelled by the Commonwealth of Virginia but, rather, were the product of Adams' palpable social philosophy. Moreover, none of the potential beneficiaries has a constitutional right to receive Adams' charity, especially when it would be literally against his will and over his dead body.

There is no violation of the Fourteenth Amendment when a state court, applying its normal principles of construction to determine a testator's intent in establishing a charitable trust, allows his explicit instructions regarding

the disposition of his private property to be effectuated. Neither a plea for further governmental intrusion into private matters nor sound constitutional doctrine requires otherwise.

Accordingly, The Hermitage Home respectfully requests that the Petition be denied.

Respectfully submitted,

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FILING AND MAILING CERTIFICATE

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